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No. 06-562

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER
v.
ATLANTIC RESEARCH CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE FORMER ADMINISTRATOR CAROL M. BROWNER, FORMER ASSISTANT ADMINISTRATORS DON R. CLAY, TIMOTHY FIELDS, JR., STEVEN A. HERMAN, MARIANNE LAMONT HORINKO, ELLIOTT P. LAWS, AND DR. J. WINSTON PORTER, AND FORMER GENERAL COUNSELS JONATHAN Z. CANNON AND JEAN C. NELSON OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae are nine former senior officials of the United States Environmental Protection Agency ("EPA"). They each had substantial responsibility for administering the Superfund program established by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[1] Each amicus has a longstanding professional expertise relevant to the question presented in this case and to the ramifications to the Superfund program of how the Court decides that question. Each has a strong personal interest in this Court's resolution of the important legal issue raised in this case, and in the efficient, effective and fair administration of the Superfund program so as to protect public health and the environment throughout the United States.

The *amici* include a former EPA Administrator who had overall responsibility for all EPA programs and devoted substantial attention to the Superfund program; two former General Counsels who had responsibility for counseling the Agency and its leadership on legal issues under CERCLA; and a former Assistant Administrator for Enforcement and Compliance Assurance who had responsibility for enforcing CERCLA, which enforcement was a central element of the Superfund program. The *amici* also consist of the last five persons (other than the present office holder) to have served as the Assistant Administrator for the Office of Solid Waste and Emergency Response ("OSWER")—the office charged with primary responsibility for implementing the Superfund

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[1] The parties' written consents to the filing of this brief are being submitted to the Clerk of this Court. Pursuant to S.Ct. R. 37.6, *amici* state that this brief was not authored, in whole or in part, by counsel for a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici* or their counsel.

program. Collectively, these five *amici* led OSWER for almost twenty years, and through four Administrations.

Amici are concerned that the position advanced by the Solicitor General on behalf of the United States in this case will substantially weaken the Superfund program and will undermine crucial policies which have been lynchpins of the program throughout its existence—encouraging expeditious private party cleanups of contaminated sites; applying CERCLA's "polluter pays" principle equally to federal agencies when they are polluters; reducing the litigation and transaction costs of the Superfund program; and enforcing CERCLA in a fair and equitable manner. *Amici* have devoted large amounts of their time and energy to achieving these goals, and a ruling in favor of Petitioner will undermine that which *amici* have worked so hard to accomplish.

A further description of the backgrounds of the individual *amici* is set forth in an Appendix to this brief.

SUMMARY OF ARGUMENT

In June 1996, EPA issued a guidance document to implement a series of reforms that then Administrator Browner (one of the *amici*) had recently announced. In that guidance document, EPA summarized three goals underlying several of these reforms: "to provide greater fairness, reduce litigation and transaction costs, and promote private party cleanup of Superfund sites." United States Environmental Protection Agency, Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/ Remedial Action and Non-Time-Critical Removals (June 3, 1996), at 1. None of these three objectives were new. They all had been articulated for years in CERCLA's legislative history, in Administration statements on the statute's

implementation, and in judicial holdings on its interpretation. But the formulation in the 1996 guidance document is useful because each of the three purposes recognized there as integral elements of CERCLA enforcement policy would be substantially undermined if Petitioner's counter-textual interpretation of Section 107(a)(4)(B) of CERCLA were accepted by this Court: private party cleanups would be discouraged and delayed, litigation and transaction costs would increase, and unfairness would result.

The overarching objective of CERCLA is to facilitate the prompt cleanup of contaminated sites around the United States at which there have been releases of hazardous substances, so as to protect human health and the environment. Because the number of sites in need of cleanup far exceeds the number of sites EPA has had the resources to address, private party cleanups undertaken without EPA involvement are critical to our national effort to cleanup hazardous sites.

In enacting CERCLA in 1980, Congress recognized that a statute intended to provide (as its name connotes) for "comprehensive environmental response" could not rely solely on government to effectuate that response. So from day one, CERCLA has encouraged private party cleanups by, among other things, providing for the recovery of response costs not just by federal, state and tribal governments, but, as indicated in Section 107(a)(4)(B), by "any other person." Private parties were encouraged to undertake cleanup through the carrot of being able to recover those costs, in whole or in part, from other parties who are liable under CERCLA.

Petitioner argues that parties who may themselves be liable cannot utilize the cost recovery option of Section 107(a)(4)(B). If this position were adopted, it would

severely undermine CERCLA's objectives by discouraging private parties from undertaking prompt, high-quality cleanups of contaminated sites. It would instead encourage those parties to delay cleanup until the government files suit, so that they do not lose their ability to seek cost sharing from other parties who may be liable for cleanup costs at the same site. This would lead to unnecessary litigation, which would both divert scarce governmental resources from more pressing needs and increase the cost of the Superfund process for parties who have, until now, been willing to undertake cleanups without litigation. And the result would compromise the overall fairness of the CERCLA liability scheme by penalizing those who undertake cleanups voluntarily and rewarding those who do not.

Moreover, the position advanced by Petitioner would mean, in combination with this Court's ruling in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), that recipients of administrative cleanup orders under Section 106 of CERCLA—orders which are key elements of the CERCLA enforcement program—could not comply with those orders and then seek recovery of their costs from other liable parties. In contrast, those order recipients who refused to comply, and who provoked a lawsuit from the government, would have a right to recover from other liable parties. Such a result would create irrational incentives, and would again undermine the Agency's ability to encourage or obtain private party cleanups.

Finally, just as CERCLA recognizes that government cannot be the sole solution to the challenges that CERCLA is intended to address, it also recognizes that private parties are not the sole source of those problems. The government, especially the federal government, has been a major source of the problem, and under CERCLA, it needs to be subject to the "polluter pays" principle just like private parties. But the

position advanced by the United States here will put the federal government when it is a polluter in a far better position than private parties would be in similar circumstances. In other words, the position advanced by the United States would result in allowing some federal agencies that have contributed to contaminated sites to escape liability for their conduct, and in so doing improperly places the interests of those federal agencies ahead of the interests of EPA in enforcing CERCLA fairly and equitably as to all responsible parties, including federal agencies.

ARGUMENT

I. INTERPRETING SECTION 107 CONTRARY TO ITS EXPRESS LANGUAGE TO PRECLUDE CLAIMS BY POTENTIALLY RESPONSIBLE PARTIES WOULD DISCOURAGE AND DELAY THE CLEANUP OF CONTAMINATED SITES

A. The Importance of Encouraging Private Party Cleanups

The leaders of EPA and of its Superfund program have long recognized the importance of promoting prompt and effective cleanup of sites by private parties. After all, cleanup of contaminated sites is why CERCLA exists, and there are far more contaminated sites in the United States than EPA will ever have the resources to address. It has been estimated that there may be over 450,000 contaminated commercial and industrial sites across the United States.[2] In contrast, in fiscal year 2006, EPA was able to conduct or

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[2] EPA, The Facts Speak for Themselves: A Fundamentally Different Superfund Program (Nov. 1996), *available at* http://www.epa.gov/superfund/ whatissf/sf_fact4.pdf.

oversee cleanup construction projects (undertaken by EPA or PRPs) at 414 sites. EPA, Superfund Nat'l Accomplishments Summary Fiscal Year 2006 as of Dec. 2006, *available at* http://www.epa.gov/superfund/action/process/numbers06.htm.

These 414 Sites will generally be those most in need of cleanup. But it is clear that most of the contaminated sites in the United States will not be cleaned up by EPA or under EPA's supervision. Encouraging private party cleanups without EPA involvement is therefore essential to addressing the national inventory of contaminated sites.

Congress emphasized the importance of encouraging private party cleanup in the initial 1980 enactment of CERCLA by clearly providing for recovery of response costs by private parties under Section 107(a)(4)(B). The provision for recovery of private party cleanup costs was recognized by this Court in *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994).

Congress also emphasized the goal of encouraging private party cleanup when debating the 1986 SARA amendments. For example, Representative Lent stated: "I am especially proud of a key groundbreaking structural reform that will encourage responsible parties to come forward and take responsibility for cleaning up the toxic waste sites they helped create." 131 Cong. Rec. H4652 (1985). During Congressional hearings on the SARA amendments, Assistant Attorney General Habicht also articulated the importance of encouraging private party cleanups and encouraging persons to undertake cleanup without an EPA enforcement lawsuit: "As the Government's goals in this enforcement process become clear, we're confident that the reasonable parties around the country, who have already demonstrated a recognition of what the rules

are and what the goals of the Government are, will come forward and will become participants in the cleanup process." Reauthorization of Superfund: Hearings Before the Subcomm. on Water Res. of the H. Comm. on Public Works and Transp., 99th Cong. 549 (1985).

Congress recently reemphasized the goal of encouraging private party cleanup when it passed the Small Business Liability Relief and Brownfields Revitalization Act. *See* Pub. L. No. 107-118, 115 Stat. 2356 (2002). These amendments to CERCLA sought, among other things, to stimulate voluntary cleanup programs at the state and local level by providing grants to facilitate private party cleanup of so called "brownfield" sites, contaminated properties with the potential for productive reuse and development. *Id.* § 211. The Senate committee report accompanying this legislation recognized the significance of voluntary cleanup to the overall contaminated property problem, observing that "[t]he vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program." S. Rep. No. 107-2, at 15 (2001).

That same Senate committee report referred with approval to existing EPA policy for reaching Memoranda of Agreement ("MOA") with states on voluntary cleanup programs. *Id.* In 1997 guidance on drafting MOA with states, EPA clearly indicated its belief that the availability of contribution under CERCLA was an important component of voluntary cleanup programs. *See* Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs, 62 Fed. Reg. 47,495 (Sept. 9, 1997). That guidance reflected EPA's position that a private party taking action under a state voluntary cleanup program can bring a claim against other liable parties as long as cleanup complied with the National Contingency Plan ("NCP"): "The

MOA should make clear to any private party that recovery of response costs under CERCLA will require that the cleanup action meet the requirements outlined in the National Contingency Plan." *Id.* at 47,499.

As this EPA guidance indicates, a broad right of recovery from other liable parties is essential for encouraging safe and effective private party cleanups. This concept was not new in 1997. The necessity of a broad right of recovery was emphasized when President Reagan transmitted his administration's proposed Superfund amendment bill, a precursor to SARA, to Congress in 1985. In the explanatory material accompanying the bill, it was acknowledged that "[p]rivate parties may be more willing to assume the financial responsibility for cleanup if they are assured that they can seek contribution from other" responsible parties. H.R. Doc. No. 99-32, at 73 (1985).

The encouragement of private party cleanups has been one of the great successes of the Superfund program. When reporting on the status of Superfund in 1998, then Acting Assistant Administrator Timothy Fields, Jr. (one of the *amici*) stated that "responsible parties are performing or funding approximately 75% of Superfund long-term cleanups, saving taxpayers more than $12 billion to date." Hearing Before the Subcomm. on Finance and Hazardous Materials, (Feb. 4, 1998) (statement of Timothy Fields, Jr.), *available at* http://www.epa.gov/superfund/action/congress/test0204.htm. Similarly, then Assistant Administrator Steven A. Herman (another of the *amici*) emphasized that "responsible parties play a vital, and in our view, irreplaceable role in cleaning up the nation's Superfund sites." Hearings Before the Subcomm. on Commerce, Trade and Hazardous Materials of the S. Comm. on Commerce (July 18, 1995) (statement of Steven A. Herman).

B. Affirming the Court of Appeals Decision will Get More Sites Cleaned Up, and Cleaned Up Faster

There are many reasons that a private party would undertake a voluntary cleanup of a contaminated site: the party knows it is liable for some part of the contamination and desires to promptly reduce risks to human health or the environment; the party desires to conduct the cleanup before the situation is exacerbated by contaminant migration or the passage of time; the party desires to avoid liabilities to third parties who may be affected by migrating contamination; or the party wants to take advantage of incentives available for participation in a State voluntary cleanup program. All of these reasons support CERCLA's ultimate goal of achieving prompt cleanup. Yet in all of these situations, the party undertaking cleanup would, in Petitioner's view, have no ability to recover its costs from other liable parties under CERCLA.

The inevitable result of adopting Petitioner's position would be that fewer parties would undertake voluntary cleanups. The party considering such a cleanup may have been only a small contributor to the problems at the site, or may have had only technical liability as the present site owner without having contributed to the contamination at all.[3] Yet despite the fact that there may be other clearly liable and viable parties from whom the cleanup costs could be sought, under Petitioner's view the party actually doing the cleanup has no ability to sue those other parties. The

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[3] Present owners of contaminated sites are often liable for those sites even if their actions did not contribute to the contamination in any way. While there are defenses to liability available for some owners of contaminated property, those defenses are not always viable, even for owners who have done nothing to contribute to the contamination.

entire cost of the cleanup will fall on the party who voluntarily remediates the site, and the other parties can escape responsibility altogether. In such a situation, whatever incentives there may be for a private party to undertake cleanup will have to be weighed against the disincentive of losing any ability to get other liable parties to share in the cleanup costs. And in that balance, the big loser is likely to be prompt cleanups. In a world where "no good deed goes unpunished," there will be fewer good deeds, which translates here to fewer voluntary cleanups. If Petitioner prevails, the net effect will be that there will be more contaminated sites in the United States than if Respondent prevails.

Such a result would also have a devastating effect on the formal voluntary cleanup programs that many states have adopted with encouragement from EPA. EPA has long made it clear that parties participating in such programs should be able to seek recovery of costs from other liable parties under CERCLA. *See* 55 Fed. Reg. 8666, 8792-93 (Mar. 8, 1990) ("EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination."). If it turns out that EPA was wrong in holding out the hope of cost recovery for those who do voluntary cleanups, the cleanup programs will be sorely damaged.

Not only is the potential availability of cost sharing an important incentive for private parties to conduct cleanups, it is also a powerful incentive for them to conduct good and thorough cleanups. CERCLA provides that a private party can only recover response costs that are "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B); *see also Morrison Enter. v. McShares, Inc.*,

302 F.3d 1127, 1135-36 (10th Cir. 2002). The NCP is part of CERCLA's implementing regulations, and it contains detailed requirements for how cleanups are to be conducted. *See* 40 C.F.R. part 300. A party that knows it will have to demonstrate compliance with the NCP to recover its costs from other liable parties has a strong incentive to conform to the NCP, which helps ensure that the cleanup is fully protective of human health and the environment. A party that knows it cannot recover its costs under CERCLA will not have the same incentive to comply with the NCP.

In 1988, EPA recognized this incentive and proposed revisions to the NCP that were intended to make it easier for a private party undertaking cleanup to know how to comply with the NCP. EPA stated "that providing a list of requirements to be complied with in order to be consistent with the NCP will enhance the probability of a successful cost recovery action, thus providing an incentive to other persons to undertake response actions." 53 Fed. Reg. 51,394, 51,462 (Dec. 21, 1988). In 1990, EPA amended the NCP, adding a new Subpart H to describe how private parties seeking to undertake cleanups should document their costs so that they could recover them from other liable parties. EPA stated that "it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination." 55 Fed. Reg. 8666, 8792-93 (Mar. 8, 1990) .[4]

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[4] The provisions added by EPA to the NCP make abundantly clear that in EPA's view, Section 107(a)(4)(B) **can** be utilized by persons who themselves have CERCLA liability. This can be seen in two ways. First, 40 C.F.R. § 300.700(c) provides:

C. The Solicitor General's Brief is Inconsistent With EPA's Policies and Judgment

The United States' brief disparages the importance of voluntary cleanups not done pursuant to settlements with the

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(1) Responsible parties shall be liable for all response costs incurred by the United States government or a state or an Indian tribe not inconsistent with the NCP.

2) Responsible parties shall be liable for necessary costs of response actions to releases of hazardous substances incurred by any other person consistent with the NCP.

Petitioner argues that the phrase "any other person" in Section 107(a)(4)(B) means any person not listed as liable in that section. But the phrase "any other person" in Section 300.700(c)(2) must mean any person other than the United States, a state or a tribe, because the CERCLA liable parties are not enumerated in the regulation (as they are in the statute). Even more compelling is that Section 300.700(c)(3) provides that:

For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:

(ii) Any response action carried out in compliance with the terms of an order issued by EPA pursuant to section 106 of CERCLA, or a consent decree entered into pursuant to section 122 of CERCLA, will be considered "consistent with the NCP."

Clearly, a party that receives a Section 106 Order or enters into a consent decree with EPA would be presumed to be liable under Section 107. But the NCP makes clear that such parties can still sue under Section 107(a)(4)(B).

government. It asserts that "there is little evidence that, in enacting CERCLA and SARA, Congress intended to promote unsupervised cleanups *at the expense of* government-supervised cleanups pursuant to settlement." U.S. Brief at 39. The United States' brief further asserts that all a party seeking to do a voluntary cleanup and preserve its right to cost sharing from other parties needs to do is enter into a settlement with EPA. It argues: "Moreover, to the extent that a property owner . . . wishes to recover some of its costs from other PRPs, the property owner need only enter into a settlement with the federal or state government." *Id.* at 43.

These statements are at odds with the practical realities of how CERCLA is administered. Certainly settlements with PRPs are important tools, and preferable to contentious litigation. That is beyond dispute. But the process of negotiating and administering settlements is a complex and costly one. Each settlement that EPA enters into requires assembling and analyzing available data and other information, and determining the nature of the remedial work that should be implemented. And once it enters into such a settlement, EPA has an obligation to make sure that the settlement terms are complied with. All of this requires resources, and, were settlements the only gateway for parties wishing to undertake cleanups to be able to obtain cost recovery from other parties, far more resources than EPA and the Superfund program have. For example, parties considering acquiring contaminated properties have often sought to enter into settlements with EPA, called Prospective Purchaser Agreements. But EPA's guidance for such agreements has limited their availability to cases where "an EPA action at the facility has been taken, is ongoing or is anticipated to be undertaken by the Agency." EPA, Guidance on Settlements with Prospective Purchasers of Contaminated Property (May 24, 1995), *available at*

http://www.epa.gov/swerosps/bf/html-doc/purchase.htm. This requirement was intended to preserve EPA's "limited resources."

And disparaging the value of voluntary cleanups undertaken without a settlement with the government is not justified. As discussed above, the potential availability of a cost recovery remedy and the corresponding requirement to comply with the National Contingency Plan will incentivize the quality and promptness of such cleanups. In other words, the experience and judgment of EPA has been that it is worthwhile and environmentally beneficial to encourage voluntary cleanups done without settlements, and that requiring settlements as a prerequisite to cost recovery in all cases would be a waste of scarce governmental resources. It is unfortunate that the Solicitor General would take a position, in a case in which the United States is a party because it is a PRP, that is at odds with EPA's often repeated judgment on these issues.[5]

D. Petitioner's Position Would Discourage Compliance with Administrative Cleanup Orders

Section 106 of CERCLA allows EPA to issue orders to liable parties to undertake cleanup. This is a powerful tool, and one that EPA uses frequently. EPA guidance encourages the use of such orders so that liable parties and not EPA will undertake cleanup. EPA guidance also encourages the issuance of such orders to a subset of all the liable parties at a site, based on an assertion of joint and

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[5] We note in this regard that the name of EPA's General Counsel does not appear on the Solicitor General's Brief here as it did, for example, on the Solicitor General's brief in *Environmental Defense v. Duke Energy*, No. 05-848 (U.S. Apr. 2, 2007).

several liability, so that enforcement of the order by EPA will be manageable. *See* EPA, Documentation of Reason(s) for Not Issuing CERCLA § 106 UAOs to All Identified PRPs (Aug. 2, 1996), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/reason-cer106-rpt.pdf. What happens, then, if there are 60 liable parties at a site, EPA issues a cleanup order to 30 of those, and only 10 of those agree to comply with the order and in fact undertake the entire cleanup? Can those 10 sue the 20 non-compliers and the 30 non-recipients to require them to share in the costs?

Under the Court's decision in *Cooper Industries*, it is unlikely that the administrative order would be considered a civil action to give rise to a contribution claim under Section 113(f). Thus, the order recipients' ability to recover from the non-compliers or non-recipients will turn on whether they have a claim under Section 107(a)(4)(B). EPA's regulations and guidance have assumed that the compliers would be able to seek cost sharing from other liable parties. But if that is incorrect, and the Section 107 remedy is not available, there will be an incentive to order recipients to not comply with the order until they are sued. Such a party would run the risk of sanctions for its failure to comply, but that threat may be outweighed by the fear of losing any ability to pursue other liable parties. Again, the position advocated by the Solicitor General here would punish PRPs who do the right thing (comply with an order) and reward those who do not (and disobey the order).

II. PETITIONER'S POSITION WOULD ALLOW MANY FEDERAL PRPS TO ESCAPE LIABILITY

Another important objective of CERCLA is to ensure that federal government PRPs are treated the same as private

PRPs, and are responsible for cleaning up the contamination they created. This concept is explicitly set forth in the statute itself. Section 120(a) provides:

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C. § 9620(a)(1).

EPA officials have often emphasized the importance of applying CERCLA consistently to federal PRPs. For example, Administrator Browner emphasized that "Superfund is . . . dedicated to cleaning up our nation's hazardous waste sites, **including those caused by the Federal government,** and protecting public health and the environment for citizens no matter where they live in our country." Hearings Before the H. Subcomm. on Finance and Hazardous Materials (May 12, 1999) (statement of Carol Browner) (emphasis added), *available at* http://www.epa.gov/superfund/action/congress/05-12-99.htm. Similarly, in 2001 Administrator Whitman expressed EPA's continued commitment "to a level playing field between Federal agencies and departments and the private sector. Americans rightfully expect their government to abide by the same environmental laws and standards as private business." Letter from Christine Todd Whitman, EPA, to Sen. Jeffords, Chairman S. Comm on Env't and Pub. Works (Oct. 4, 2001), *available at* http://www.epa.gov/compliance/resources/policies/civil/federal/letterwhitman.pdf

But this goal of consistent treatment has been difficult to obtain, because EPA has not been able to sue other parts of the Executive Branch in court and has rarely been able to even issue administrative orders to federal PRPs. Thus, the ability to bring federal PRPs into the process is often dependent on the ability of other PRPs to sue federal PRPs. In light of *Cooper Industries,* private PRPs have seized upon Section 107(a)(4)(B) as a possible method for forcing federal PRPs into the process. If that method is also foreclosed, the ability to hold federal agency PRPs accountable will be severely diminished, and such PRPs may become a special class with a new *de facto* sovereign immunity of the type Congress had explicitly precluded in Section 120.[6]

III. PETITIONER'S POSITION WOULD RESULT IN INCREASED LITIGATION AND TRANSACTION COSTS

One of the most prevalent criticisms of the Superfund program over the years has been that it is perceived to be "laden with transaction costs, particularly attorneys fees." Hearings Before the Subcomm. on Transp. and Hazardous Materials of the H. Comm. on Energy and Commerce (Feb. 10, 1994) (statement of Elliott P. Laws, Ass't Administrator). Mr. Laws (one of the *amici*) noted that "any change that increases the transaction costs resulting from

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[6] In making this point, we in no way intend to disparage the great efforts that federal agencies have made to clean up properties they have owned and operated or otherwise are responsible for. Amici worked closely and cooperatively while at EPA with many federal agencies to address their CERCLA cleanup obligations. Our point is that were the Court to adopt the position urged by the Solicitor General, it would inject both an unfairness and the perception of unfairness in the respective treatment of federal and private PRPs, and that would adversely effect the overall CERCLA program.

public and private litigation is equally unacceptable." Similarly, then Assistant Administrator Steven Herman noted during testimony before Congress the importance to EPA of "ensuring that [PRP] dollars are spent on the actual cleanup costs and not extensive legal costs." Hearings Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transp. (April 10, 1997) (statement of Steven Herman, Ass't Administrator), *available at* http://www.epa.gov/superfund/action/congress/clrtest.htm.

While some measure of litigation is unavoidable in a program such as that created by CERCLA, which imposes a broad and substantial liability scheme, EPA leaders have long and consistently sought to adopt policies that reduce the amount of litigation required to implement the Superfund program, and with the reduction in litigation, the amount of money being spent on things other than site cleanup. The position advocated by the United States here would run directly contrary to this important objective, in a number of ways.

First, a party contemplating a voluntary cleanup will be incentivized to wait until it has been sued by the government before undertaking that cleanup, so it will be able to seek a cost sharing from other liable parties under Section 113(f). In contrast, if the Court affirms a broad right of recovery under Section 107(a)(4)(B), a right that extends to parties themselves liable, anyone can undertake a voluntary cleanup and still seek cost sharing from other parties.

Second, a party that receives a Section 106 cleanup order would, if the United States prevails here, have an incentive to delay compliance with that order until it is sued, so as to ensure a cost sharing remedy. But a broad Section

107(a)(4)(B) right would encourage prompt compliance with such orders without the need for litigation.

Third, were the Court to adopt the United States' position here, it would result in still more litigation over which types of agreements with the government qualify the settler as a "person who has resolved its liability to the United States or a State for some or all of the costs of such action in an administratively or judicially approved settlement" and therefore entitled to contribution under Section 113(f)(3)(B). Following *Cooper Industries*, there has already been much litigation over this issue, and that litigation will continue if Petitioner prevails here. But if Respondent prevails, and a broad and clear right of recovery under Section 107(a)(4)(B) is established, the Section 113(f)(3)(B) issue will largely be moot, and there will not be the need for case by case adjudications over whether a settlement falls within the scope of Section 113(f)(3)(B).

IV. PROVIDING FOR A BROAD RIGHT OF RECOVERY UNDER SECTION 107(A)(4)(B) WOULD CONTRIBUTE TO THE OVERALL FAIRNESS OF THE SUPERFUND PROGRAM

Recognizing that the strict liability scheme established by CERCLA can impose broad liability on persons who did nothing that was wrong at the time they did it, and that application of principles of joint and several liability has the potential to impose disproportionate liability on certain PRPs, the leaders of the Superfund program at EPA have long and consistently sought to maximize the fairness of the program consistent with the goal of prompt site cleanups.

In Congressional testimony, Assistant Attorney General Habicht elaborated on the centrality of contribution

rights to CERCLA's fairness, stating very simply: "[t]he fairness of a joint and several liability scheme depends upon the clear availability of contribution." Oversight Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary, 99th Cong. 51 (1985).

Similarly, the cases interpreting CERCLA have long recognized the importance of contribution to the fairness of a joint and several liability scheme. For example, in *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985), a case that preceded the 1986 Amendments to CERCLA that added Section 113(f), the district court found that there was a right to contribution under CERCLA and such a right was essential to the fairness of the liability scheme created. The court cited Dean Prosser's statement that "contribution is an integral component of joint and several liability." *Id.* at 1490 (quoting Prosser, *Law of Torts* § 50 (4th ed. 1982)). The court in *ASARCO* also cited this Court's recognition of the fairness of allowing contribution among parties who have joint and several liability. *Id.* (citing *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 86-87 (1981)).

Insuring that Superfund is implemented in fair manner has, as discussed above, remained a priority of EPA's leadership in implementing the statute. For example, in March 1998 Congressional testimony Administrator Browner emphasized how "EPA has addressed concerns about the fairness of Superfund." Hearings Before the H. Subcomm. on Finance and Hazardous Materials (Mar. 5, 1998) (statement of Carol Browner), *available at* http://www.epa.gov/ocir/hearings/testimony/105_1997_1998/030598.htm.

Confirming a broad right of private party cost recovery under Section 107(a)(4)(B) will enhance the overall fairness of the Superfund program. It is fair that parties who perform cleanups without the need for litigation, the type of conduct that should be rewarded and not punished, have the ability to obtain cost sharing from other liable parties who refused or otherwise did not participate in the cleanup. And it is fair that those parties who choose to comply with a Section 106 Order issued by EPA have the ability to obtain cost sharing from those parties who refuse to comply with such orders or those parties who are not named in the order by EPA. Conversely, telling parties who receive Section 106 orders that they must comply, but may not pursue those who do not, would be manifestly unfair.

We do not mean to suggest that the courts can or should rewrite clear statutory language to achieve the programmatic and policy objectives we have discussed. But where the statutory language is best read, as it is here, as providing for a right that achieves those objectives, the courts should hesitate to achieve a result that is at odds with both the statutory language and the goals that the statute was enacted to achieve. *See, e.g.*, *Comm'r v. Engle*, 464 U.S. 206, 217 (1984) ("Our duty then is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'") (citation omitted); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983) ("As in all cases of statutory construction, our task is to interpret the words of the statute in light of the purposes Congress sought to serve.") (citation and quotation marks omitted).

CONCLUSION

For the reasons stated above, and by the other *amici* supporting Respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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April 5, 2007

*Joseph S. Kakesh is admitted only in Maryland. He is currently under the supervision of principals of the firm who are members in good standing of the D.C. Bar, pending approval of application for admission to the D.C. Bar.

APPENDIX

APPENDIX

Description of *Amici* Curiae

Carol M. Browner was appointed by President Clinton to be the Administrator of the United States Environmental Protection Agency and was confirmed by the United States Senate in January, 1993. She served in the position for eight years, longer than any other EPA Administrator. Prior to her appointment to EPA, Ms. Browner served as Secretary of the Environment for the State of Florida.

Jonathan Z. Cannon served as the Acting General Counsel of the United States Environmental Protection Agency from 1995 to 1998 and as the Assistant Administrator for Administration and Resource Management for the Agency from 1993 to 1995. He was appointed to the latter position by President Clinton and confirmed by the United States Senate. Mr. Cannon also served as the Acting Assistant Administrator of the Office of Solid Waste and Emergency Response from March to November 1989 and as the Acting Deputy Administrator of EPA from March to May 1993.

Don R. Clay served as the Assistant Administrator for the Office of Solid Waste and Emergency Response of the United States Environmental Protection Agency from 1989 to 1993. Mr. Clay was appointed to that position by President George H.W. Bush and confirmed by the United States Senate. Prior to that, Mr. Clay served as Deputy Assistant Administrator of the Office of Air and Radiation from 1986 to 1989, as Acting Assistant Administrator for Pesticides and Toxic Substances from

1985-86, and Director of the Office of Toxic Substances from 1981 to 1985.

Timothy Fields, Jr. served as the Assistant Administrator for the Office of Solid Waste and Emergency Response of the United States Environmental Protection Agency from 1999 to 2001. Mr. Fields was appointed to that position by President Clinton and confirmed by the United States Senate. Prior to that, Mr. Fields served as the Acting Assistant Administrator for the Office of Solid Waste and Emergency Response from 1997 to 1999, and the Principal Deputy Assistant Administrator for the Office of Solid Waste and Emergency Response from 1994 to 1997. During his thirty year career at EPA, Mr. Fields also served as Director of the Superfund Revitalization Office; as Deputy Director of the Office of Emergency and Remedial Response; as Director of the Emergency Response Division; and as and Deputy Director of the Hazardous Site Control Division.

Steven A. Herman served as the Assistant Administrator for Enforcement and Compliance Assurance of the United States Environmental Protection Agency from 1993 to 2001. Mr. Herman was appointed to that position by President Clinton and confirmed by the United States Senate.

Marianne Lamont Horinko was named Acting Administrator of the United States Environmental Protection Agency by President George W. Bush on July 10, 2003, and served in this position from July 14, 2003 until November 5, 2003. She also served as Assistant Administrator for the Office of Solid Waste and Emergency Response from October 2001 to June 2004 (except for the time during which she was Acting

Administrator). Ms. Horinko was appointed to that position by President George W. Bush and confirmed by the United States Senate.

Elliott P. Laws served as the Assistant Administrator for the Office of Solid Waste and Emergency Response of the United States Environmental Protection Agency from 1993 to 1997. Mr. Laws was appointed to that position by President Clinton and confirmed by the United States Senate.

Jean C. Nelson served as General Counsel of the United States Environmental Protection Agency from 1993 to 1995. Ms. Nelson was appointed to that position by President Clinton and confirmed by the United States Senate.

Dr. J. Winston Porter served as the Assistant Administrator for Solid Waste and Emergency Response of the United States Environmental Protection Agency from 1985 to 1989. Dr. Porter was appointed to that position by President Reagan and confirmed by the United States Senate.